Supreme Court, U.S.
FILED
AUG 20 1993
OFFICE OF THE CLERK

No. 93-47

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1993

ARA AUTOMOTIVE GROUP, DIVISION OF REEVES BROTHERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner violated Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by implementing its decision to close its Grand Prairie plant without giving the Union timely notice and opportunity to bargain over the effects of the closing on employees represented by the Union.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Chippewa Motor Freight, Inc., 261 N.L.R.B. 455 (1982)	11
Creasey Co., 268 N.L.R.B. 1425 (1984)	7
Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 (1964)	8
First National Maintenance Corp. v. *NLRB*, 452 U.S. 666 (1981)	4, 5, 8, 9
International Ladies' Garment Workers Union v. *NLRB*, 463 F.2d 907 (D.C. Cir. 1972)	6
Kirkwood Fabricators, Inc., 285 N.L.R.B. 33 (1987), enforced, 862 F.2d 1303 (8th Cir. 1988)	6
Kirkwood Fabricators, Inc. v. *NLRB*, 862 F.2d 1303 (8th Cir. 1988)	6, 7
Los Angeles Soap Co., 300 N.L.R.B. 289 (1990)	7
Metropolitan Teletronics Corp., 279 N.L.R.B. 957 (1986), enforced mem., 819 F.2d 1130 (2d Cir. 1987)	6, 7, 11
M&M Transportation Co., 239 N.L.R.B. 73 (1978)	7, 11
National Terminal Baking Corp., 190 N.L.R.B. 465 (1971)	7, 11
NLRB v. *Emsing's Supermarket, Inc.*, 872 F.2d 1279 (7th Cir. 1989)	6, 7
NLRB v. *Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967)	5
Penntech Papers, Inc. v. *NLRB*, 706 F.2d 18 (1st Cir.), cert. denied, 464 U.S. 892 (1983)	6, 8

Cases—Continued: Page

Pittsburgh & L.E.R.R. v. *Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989) 9, 10
Raskin Packing Co., 246 N.L.R.B. 78 (1979) 7, 11
Riedel International d/b/a Willamette Tug & Barge Co., 300 N.L.R.B. 282 (1990) 7, 8
Rocky Mountain Hospital, 289 N.L.R.B. 1370 (1988) 11
Stamping Specialty Co., 294 N.L.R.B. 703 (1989) 11
Textile Workers Union v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965) 9
Transmarine Navigation Corp., 170 N.L.R.B. 389 (1968) 5, 6
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) .. 10
Van Dorn Plastic Machinery Co. v. *NLRB*, 881 F.2d 302 (6th Cir. 1989) 11
Yorke v. *NLRB*, 709 F.2d 1138 (7th Cir. 1983), cert. denied, 465 U.S. 1023 (1984) 12

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
29 U.S.C. 158(a)(1) 4
29 U.S.C. 158(a)(5) 4
Worker Adjustment and Retraining Notification Act of 1988, Pub. L. No. 100-379, § 3(a), 102 Stat. 891 7

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-47

ARA AUTOMOTIVE GROUP, DIVISION OF REEVES BROTHERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A26-A27) is unpublished, but the judgment is noted at 990 F.2d 1252 (Table). The decision and order of the National Labor Relations Board (Pet. App. A24-A25), including the decision of the Administrative Law Judge (Pet. App. A1-A23), is reported at 306 N.L.R.B. 610.

JURISDICTION

The judgment of the court of appeals (Pet. App. A26-A27) was entered on April 12, 1993. The petition for a writ of certiorari was filed on July 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures and distributes automotive parts at plants in the United States, including one in Grand Prairie, Texas, where it manufactured air-conditioning equipment until it closed the plant on September 30, 1990. Pet. App. A1-A2. Petitioner's Grand Prairie employees were represented by the Allied Industrial Workers of America, Local 300, AFL-CIO. *Id.* at A2.

On September 6, 1990, the Union began negotiations with petitioner to amend the existing collective bargaining agreement. The parties met for a second time on September 18 and agreed to another meeting on September 28. Pet. App. A4-A5.

Meanwhile, between Monday, September 17, and Friday, September 28, petitioner's board of directors met at its headquarters in Darien, Connecticut, to consider various options, including the closing of plants, to address its economic problems. Pet. App. A5-A6. On September 24, petitioner called the Union to postpone the negotiating session scheduled for September 28. However, petitioner never informed the Union that it was having economic problems or that its board of directors was considering the possibility of closing the Grand Prairie plant. *Id.* at A6.

On September 28, the board of directors decided to cease manufacturing operations at ARA Automotive Group effective immediately and to try to sell that operation. Pet. App. A7. On Saturday, September 29, a non-workday, each of the bargaining unit employees received the following mailgram (*id.* at A7-A8):

> As a result of recent events in the Middle East causing significant changes in the prevailing economic conditions in the United States and a

> severe drop in ARA's sales during August and September, 1990, all ARA plant employees have been placed on indefinite layoff effective immediately.
>
> You should therefore not report for work until further notice.
>
> * * * We will be meeting with your union representatives to discuss other details of your employment and you will be advised accordingly.

Employee Mauer called International Union Representative Harris, who had not received the mailgram, to tell him about the plant closure and terminations. This telephone call was the first notice to any union official of a plant shutdown. Pet. App. A8. On Monday, October 1, Harris and a group of employees went to the plant to get more information. They were denied entry by security guards. Shortly thereafter, a guard escorted Harris into the plant, where petitioner's vice president handed him a letter dated September 28. The letter averred that petitioner was closing because of events in the Middle East and a severe drop in sales; it blamed "these sudden and unforeseen business circumstances" for its failure to give "advance notice" of the decision to close. Attached to the letter was a list of the terminated employees. *Id.* at A8-A9.

Also on October 1, the Union's negotiating committee met with petitioner's representatives. The Union complained about the lack of notice of the planned shutdown and petitioner's failure to give it an opportunity to bargain meaningfully over its effects on the employees. Pet. App. A10.

On October 2, the parties met and reached agreement on the temporary recall of approximately 21 maintenance and shipping employees to assist with the shutdown. Pet. App. A10 n.9; Tr. 45-46.[1] In a meeting on October 5, the Union presented a proposal for a shutdown agreement and a request for information relating to the plant closing. Tr. 46-49, 57-58. The Union never received all the requested information. Pet. App. A10. The parties met twice more, on November 9, 1990, and on January 10, 1991. Tr. 50.

2. The ALJ, whose decision was affirmed by the Board, concluded that petitioner violated Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by implementing its decision to close its Grand Prairie plant without giving the Union timely notice and an opportunity to bargain over the effects of the closing on unit employees. Pet. App. A11-A12, A24-A25.

The ALJ, quoting *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 681-682 (1981), explained that "an employer who closes its operations has a duty to bargain with the union representing its employees over the effect on those employees 'in a meaningful manner and at a meaningful time.'" Pet. App. A10-A11. The ALJ further noted that the requirement to bargain at "a meaningful time" contemplates that bargaining will take place "*prior to* the cessation of operations unless emergency circumstances preclude advance notice to the Union of the planned closure." *Id.* at A11. (footnote omitted).

The ALJ pointed out that petitioner "discuss[ed] the shutdown over at least a two-week period prior to

---

[1] Tr. references are to the transcript of the hearing before the Administrative Law Judge (ALJ).

its effectuation" while at the same time it was engaged in "ostensible" bargaining negotiations with the Union. Pet. App. A11. The ALJ rejected petitioner's contention that "emergency circumstances" precluded advance notice. The ALJ noted that the alleged emergency circumstances—a severe drop in sales due to conditions in the Middle East—"were not supported by any factual evidence either supplied to the Union or produced at the hearing (on the ground such factual evidence was 'confidential')." *Id.* at A12 n.15.

The Board ordered petitioner, *inter alia*, to bargain with the Union, upon its request, over the effects of its plant shutdown and to pay wages to all terminated bargaining unit employees for a minimum of two weeks, in accordance with the remedy fashioned in *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968), on remand from *NLRB* v. *Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967). The Board rejected petitioner's contention that the *Transmarine* remedy was not appropriate because "the Union was in a position to bargain meaningfully during the period in which [petitioner] retained certain of the unit employees to assist in the process of plant closure." Pet. App. A25 n.2.

3. The court of appeals enforced the Board's order in an unpublished order. Pet. App. A26-A27.

ARGUMENT

The Board's decision, upheld by the court of appeals, is consistent with this Court's decision in *First National Maintenance* and does not conflict with any decision of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Although the decision to close part of an employer's business for economic reasons is not a mandatory subject of bargaining, the employer must bargain in good faith with the employees' representative about the effects of the decision "in a meaningful manner and at a meaningful time." *First National Maintenance*, 452 U.S. at 681-682. An essential element of "meaningful" bargaining is "timely notice to the union of the decision to close, so that good faith bargaining does not become futile or impossible." *Penntech Papers, Inc.* v. *NLRB*, 706 F.2d 18, 26 (1st Cir.), cert. denied, 464 U.S. 892 (1983). "Notice, to be effective, must be given sufficiently in advance of actual implementation of a decision [to close] to allow reasonable scope for bargaining." *International Ladies' Garment Workers Union* v. *NLRB*, 463 F.2d 907, 917, 919 (D.C. Cir. 1972). Accord *Kirkwood Fabricators, Inc.* v. *NLRB*, 862 F.2d 1303, 1306-1307 & n.1 (8th Cir. 1988); *NLRB* v. *Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1286 (7th Cir. 1989); *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957, 958-959 & n.14 (1986), enforced mem., 819 F.2d 1130 (2d Cir. 1987).

The Board and the courts recognize that a union is deprived of much of its bargaining power when it has no opportunity to bargain about the effects of a plant closing until after the plant is closed. For this reason, the Board requires that "absent special justification, pre-implementation notice is required to satisfy the obligation to bargain over effects." *Metropolitan Teletronics*, 279 N.L.R.B. at 959 n.14. Accord *Kirkwood Fabricators, Inc.*, 285 N.L.R.B. 33, 35 (1987), enforced, 862 F.2d 1303, 1307 (8th Cir. 1988); *Transmarine Navigation*, 170 N.L.R.B. at 389;

Riedel International d/b/a Willamette Tug & Barge Co., 300 N.L.R.B. 282, 283 (1990).[2]

Contrary to petitioner's assertion (Pet. 6-9), the Board has made clear that "[t]he rule regarding timely [pre-implementation] notice is not a per se rule. An employer can avoid [Section] 8(a)(5) liability by demonstrating that emergency circumstances justified late notice to the union." *Metropolitan Teletronics*, 279 N.L.R.B. at 959. See, for example, *Raskin Packing Co.*, 246 N.L.R.B. 78, 78 (1979) (immediate closure necessitated by bank's refusal to continue extending line of credit); *M&M Transportation Co.*, 239 N.L.R.B. 73, 74, 75 (1978) (inability to pay employees due to denial of bank loan); *National Terminal Baking Corp.*, 190 N.L.R.B. 465, 466 (1971) (theft of employer's two trucks precluded continued operation of business). And see *Creasey Co.*, 268 N.L.R.B. 1425 (1984) (need to dispose of perishable inventory justified delayed notice).[3]

---

[2] Significantly, employers of 100 or more employees are now required by law to give their employees 60 days' advance notice of partial or complete closure. See Worker Adjustment and Retraining Notification Act of 1988, Pub. L. No. 100-379, § 3(a), 102 Stat. 891. As the Eighth Circuit observed, "The fact that Congress itself determined [advance] notification should be required lends support to the proposition that the Board's determination [of a duty to allow effects bargaining prior to closure] is reasonably defensible." *Kirkwood Fabricators*, 862 F.2d at 1307 n.1.

[3] Serious financial problems alone are not sufficient justification for lack of pre-implementation notice. See, for example, *Los Angeles Soap Co.*, 300 N.L.R.B. 289, 294-296 (1990) ("undeniable financial problems" no defense to failure to give sufficient advance notice); *NLRB* v. *Emsing's Supermarket, Inc.*, 872 F.2d at 1286-1287 (failure to give timely notice not justified where there was "steady erosion of [employer's]

2. Petitioner contends (Pet. 8, 11) that the Board's decision is at odds with the Court's decision in *First National Maintenance*, which, according to petitioner, does not support the position that advance notice and opportunity to bargain over the effects of a decision to close is required by the Act. There is no merit to that contention.

Petitioner asserts (Pet. 9-11) that the Court's concern in *First National Maintenance* that requiring bargaining over a decision to close a plant would cause unwarranted delay in implementing the decision is equally applicable to pre-implementation effects bargaining.[4] However, the Court in *First National Maintenance* expressly observed that even though a union could not demand bargaining over a decision to close, effects bargaining could serve as well as decision bargaining to facilitate an exchange of information and offers between the parties that "might be helpful to management or forestall or prevent the termination of jobs." 452 U.S. at 681. The Court added that the union was entitled to a "significant opportunity to bargain about * * * job security as part of the 'effects' bargaining mandated

---

financial well-being" but no "immediate financial emergency"); *Penntech Papers, Inc.* v. *NLRB*, 706 F.2d at 27 (same-day notice not justified despite losses of more than a million dollars during the past three months). See also *Riedel International d/b/a Willamette Tug & Barge Co.*, 300 N.L.R.B. at 282-283 (employer's interest in best sales price did not excuse failure to tell union about sale until effective date of transfer).

[4] Petitioner complains (Pet. 8-9) that effects bargaining "probably would consume weeks or months." However, as this Court has noted, the Act does not require "fruitless marathon discussions." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 214 (1964).

by § 8(a)(5) * * * and the Board may impose sanctions to insure its adequacy." *Id.* at 681-682. In light of the union's right to engage in timely effects bargaining, the Court observed that "although the union has a natural concern that a partial closing decision not be hastily or unnecessarily entered into, it has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered." *Id.* at 682. Plainly, a union cannot ensure such deliberate consideration if its first opportunity for effects bargaining arises after the closure decision has been implemented.

Petitioner errs in relying (Pet. 12-15) on *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965), and *Pittsburgh & L.E.R.R.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989). *Darlington* did not involve any issue of effects bargaining; there the Court held that an employer has the absolute right to close down its business entirely. 380 U.S. at 268. In *Pittsburgh & L.E.R.R.*, the Court held that the decision of an employer to quit the railroad business by sale of the railroad could not be enjoined pending bargaining over the effects of the sale, where the injunction would effectively preclude the sale. 491 U.S. at 507, 511. In *Pittsburgh & L.E.R.R.*, the Court rejected the position that the employer had a duty under the Railway Labor Act to bargain over the effects its decision to sell the railroad would have on its employees. 491 U.S. at 503-504. While the Court in *Pittsburgh & L.E.R.R.* cited *Darlington* and *First National Maintenance* for the propositions that an employer has the right to go out of business and need not bargain about the decision to do so (491 U.S. at 507-508 & n.17), it did not question that the National

Labor Relations Act requires effects bargaining over a decision to close a plant. See *id.* at 508 n.17.

3. Petitioner's final contention—that the Board's determination is not supported by substantial evidence (Pet. 16-24)—raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). In any event, there is no merit to that contention.

Petitioner argues (Pet. 17) that "there is nothing in the record to suggest that the Reeves Board's decision to cease its manufacturing operations was made for any reason other than ARA's rapidly deteriorating economic condition." But the issue here is not whether petitioner's decision to close the plant was based on economic considerations, but whether petitioner was justified in implementing that decision before bargaining with the Union over its effects. At the hearing, the only evidence adduced by petitioner to justify its conduct was its September 28 mailgram to the employees, its October 1 letter to the Union, and the minutes of the September 28 meeting of Reeves' board of directors. None of those documents goes beyond references to "recent events in the Middle East" and allegations of a severe drop in ARA's sales during August and September 1990. As the ALJ noted, the reasons cited by petitioner "were not supported by any factual evidence either supplied to the Union or produced at the hearing (on the ground such factual evidence was 'confidential')." Pet. App. A12 n.15. Indeed, in its brief to the court of appeals and in its petition for certiorari, petitioner concedes that it provided "relatively minimal" evidence of any necessity for an immediate shutdown of the Grand Prairie plant. See Pet'r C.A. Br. 19; Pet.

19. Petitioner essentially contends that the Board should have found that emergency circumstances justified the immediate closing of the plant simply because its directors decided to shut down the plant immediately.[5]

The Board cases relied on by petitioner (Pet. 17-18) are factually distinguishable. Thus, in *Raskin Packing Co.*, 246 N.L.R.B. at 78, the Board found that a bank's discontinuance of the employer's line of credit necessitated immediate closing of the business. In *M&M Transportation Co.*, 239 N.L.R.B. at 75, the immediate closing was justified because the employer lacked funds to pay its employees. And in *National Terminal Baking Corp.*, 190 N.L.R.B. at 467, the theft of the company's delivery trucks was a "calamitous event" that necessitated an immediate shutdown.[6]

---

[5] Petitioner errs in asserting (Pet. 19) that the General Counsel had the burden of proving that petitioner's economic conditions did not justify its failure to bargain with the Union prior to implementation. The Board's position that the employer bears the burden of justifying its failure to give advance notice of a closure decision flows from the "accepted proposition of law that 'the burden of proof on matters which relate to justification for the employer's actions rests with the employer.'" *Van Dorn Plastic Machinery Co.* v. *NLRB*, 881 F.2d 302, 308 (6th Cir. 1989) (unilateral change in working conditions). Accord *Metropolitan Teletronics*, 279 N.L.R.B. at 959; *Stamping Specialty Co.*, 294 N.L.R.B. 703, 703 (1989).

[6] In *Chippewa Motor Freight, Inc.*, 261 N.L.R.B. 455, 456 (1982), while the union received only two days' notice of the employer's decision to close, the union had been aware of the employer's financial difficulties for a year and had rebuffed the employer's efforts to negotiate reductions in its labor costs. *Id.* at 459-460. *Rocky Mountain Hospital*, 289 N.L.R.B. 1370, 1371 (1988), did not involve a business shutdown. Moreover, there

Petitioner similarly errs in relying (Pet. 20-21) on *Yorke* v. *NLRB*, 709 F.2d 1138, 1144 (7th Cir. 1983), cert. denied, 465 U.S. 1023 (1984). Petitioner asserts that, unlike here, the Seventh Circuit in *Yorke* simply accepted the contention that it was in the employer's best interest to close the business immediately. However, in *Yorke* the court of appeals found that lack of funds to meet the payroll created an emergency situation justifying the failure of the bankruptcy trustee to give advance notice of the closure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

AUGUST 1993

---

the Board reversed the ALJ's finding that adverse circumstances justified the employer's unilateral changes in working conditions.